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(2)

CASE NO. 85-2117

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

JOE L. ROBINSON,
Petitioner

vs.

ROBERT C. DAUGHERTY,
Administrator of the
Ohio Bureau of Workers' Compensation

and

DELCO MORAINE DIVISION,
GENERAL MOTORS CORPORATION,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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General Motors Corporation.

20 pp

QUESTION PRESENTED FOR REVIEW

Whether or not an employee claiming a workers' compensation injury may maintain an action in federal court against his employer for claimed failure of said employee's attorneys to prosecute his workers' compensation appeal in state court.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Joe L. Robinson,
Plaintiff-Appellant

Robert C. Daugherty,
Administrator of the
Ohio Bureau of Workers' Compensation

— and —

Delco Moraine Division,
General Motors Corporation,
Defendants-Appellees.

TABLE OF CONTENTS

Question presented for review i

Parties to the preceedings in the United States Court of Appeals for the Sixth Circuit ii

Table of Authorities iv

Citations to the opinions and judgment delivered in the court below v

Statement of the case 1

Argument 3

I. There are no special or important reasons why the court should exercise its discretion and grant certiorari.

II. Petitioner has failed to state a federal cause of action.

III. Petitioner has not been deprived of due process of law.

Conclusion 6

Appendix One 7

Appendix Two 10

TABLE OF AUTHORITIES

page

Statutes

42 U.S.C. 1983 (1979)
42 U.S.C. 2000e et seq.

Case Law

Link v. Wabash R.R., 370 U.S. 626 (1962).

Other Authorities

Supreme Court Rule 17
Rule 41(B)(1), Ohio Rul. Civ. P.

CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Order of the United States Court of Appeals for the Sixth Circuit, Case No. 85-3569 (January 21, 1986) ..... See Appendix 1

Decision and Entry Sustaining Motion of Defendant Delco Moraine to Dismiss of the United States District Court For The Southern District of Ohio, Western Division, Case No. C-3-84-559 (June 2, 1985) ..... See Appendix 2

STATEMENT OF THE CASE

Plaintiff-Appellant Joe L. Robinson (Petitioner) claims he sustained an industrial injury on February 12, 1974 in the course of his employment with Defendant-Appellee Delco Moraine Division, General Motors Corporation[1] (Respondent). His application for workers compensation benefits was denied administratively by the Ohio Industrial Commission, and he filed a notice of appeal with the Montgomery County, Ohio, Common Pleas Court. Petitioner's appeal was later dismissed for want of prosecution (App. D, Petition for Certiorari). Petitioner appealed the common pleas court decision to the Court of Appeals of Montgomery County, Ohio. The court of appeals, in a *per curiam* decision dated June 1, 1984, affirmed the order of the trial court (Appendix C, Petition for Certiorari). No further appeal was taken in state court.

Petitioner then filed a complaint in the United States District Court for the Southern District of Ohio, Western Division. The district court dismissed the complaint for lack of subject matter jurisdiction (Appendix Two). The order of the district court was affirmed by the United States Court of Appeals for the Sixth Circuit (Appendix One).

Petitioner's "Statement of the Facts" is a recital of his difficulties with various attorneys who did not handle his workers' compensation case to his satisfaction, resulting in the action being dismissed for want of prosecution by the trial court. On appeal the Montgomery County Court of

[1] Pursuant to Sup. Ct. R 7. disclosure is made that Defendant-Appellee Delco Moraine Division, General Motors Corporation, is a wholly owned subsidiary of General Motors Corporation.

Appeals found the trial court's dismissal of the case was not an abuse of discretion:

> *The trial court imposed this sanction following months of unexplained procedural delays, appearances and withdrawals by numerous attorneys on appellant's behalf, two show cause orders, written notice to appellant, and a twenty day grace period.*
>
> *(Appendix C-6, Petition for Certiorari)*

Petitioner's Statement of the Facts claims that he filed a "complaint of discrimination" in United States District Court for violation of 42 U.S.C. 1983 (1979). Petitioner in fact filed several amendments to the complaint, none of which stated a claim upon which relief could be granted, as determined by the district court:

> *Plaintiff's contention appears to be that Delco should have paid him worker's* [sic] *compensation and that his attorney who handled the case (identity unknown) committed either an act of discrimination or an act of malpractice, or both, in failing to prosecute said claim.*
>
> *.....It is clear to this court that the Plaintiff has failed, in spite of having been given several opportunities to do so, to set forth an actionable federal claim of discrimination.*
>
> *(Appendix B-2, 3 Petition for Certiorari)*

The Sixth Circuit Court of Appeals considered the same documents as the district court and came to the same conclusion.

ARGUMENT

I. THERE ARE NO SPECIAL OR IMPORTANT REASONS WHY THE COURT SHOULD EXERCISE ITS DISCRETION AND GRANT CERTIORARI

Plaintiff's claim of an industrial injury was disallowed by the Ohio Industrial Commission. He is disappointed that his appeal in state court was dismissed and blames his lawyers. Having failed to secure relief from the Montgomery County Court of Appeals in the State of Ohio he seeks a remedy in federal court.

None of the considerations governing review on certiorari enunciated in Supreme Court Rule 17 are present in this case. There is no conflict in the decisions of the United States Circuit Courts; no conflict with the decision of a state court; and no important question of federal law which should be settled by this Court.

II. PETITIONER HAS FAILED TO STATE A FEDERAL CAUSE OF ACTION

It is clear from the decision of the United States District Court (Appendix Two) that Petitioner was granted ample opportunity to amend his complaint to state a federal cause of action. Had Petitioner made any factual allegations that would have supported a claim against his employer under federal law his complaint would not have been dismissed. There were no allegations that would support a claim of racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, or 42 U.S.C. 1983 (1979). There were no allegations in the Complaint that any employee or agent of Respondent-Employer conspired with any state official; consequently the Sixth Circuit Court of Appeals correctly concluded that there was no state action alleged as to properly support a claim under 42 U.S.C. 1983 (1979).

The Sixth Circuit Court of Appeals also rightly concluded that Petitioner's claim is essentially a workers' compensation matter which is not cognizable in federal court.

III. PETITIONER HAD NOT BEEN DEPRIVED OF DUE PROCESS OF LAW

Petitioner cites the dissenting opinion of Justice Black in *Link v. Wabash R.R.*, 370 U.S. 626 (1962), as support for the proposition that the sins of the lawyer should not be visited on the client. In *Link*, the District Court dismissed the Petitioner's action without notice to the Petitioner or his lawyer shortly after the lawyer failed to appear at a scheduled pretrial conference without an adequate excuse. Upon appeal to the Supreme Court, the majority found that the district court had the authority to dismiss a complaint for failure to prosecute, that the district court did not abuse its discretion under the facts of that case, and that the Plaintiff was not deprived of due process of law.

In the case at bar Petitioner alleges in his Statement of the Facts that numerous attorneys failed to prosecute his workers' compensation action, and he would have this Court believe that the Petitioner is the innocent victim of a host of unscrupulous lawyers, including counsel for the Respondent-Employer. No substantiation has been offered to support these allegations, and certiorari should not be granted simply because Petitioner baldly asserts that he has been deprived due process of law.

After Petitioner's workers' compensation claim was denied by the Ohio Industrial Commission, he filed a notice of appeal with the Common Pleas Court of Montgomery County, Ohio. At that time he was acting as his own lawyer. He claims that the trial judge ordered him to obtain the services of an attorney and the ones he hired did not prosecute his case. However, the opinion of the Court of Appeals of Montgomery County, Ohio (Appendix C, Petition for Certiorari) clearly demonstrates that it was the failure and refusal

of Petitioner, not his attorneys, to comply with the Ohio Rules of Civil Procedure that resulted in his case being dismissed for failure to prosecute. Although Petitioner hired and fired a number of lawyers, he was acting *pro se* when the trial court ordered him to comply with the civil rules or risk dismissal. Rule 41(B)(1), Ohio Rules of Civil Procedure, provides that where the Plaintiff fails to prosecute a case the trial court may dismiss the action. Petitioner was given written notice to prosecute his case; he failed to do so, and as a result his action was dismissed. The Court of Appeals of Montgomery County, Ohio was correct in finding that the trial court did not abuse its discretion in dismissing the action.

CONCLUSION

Petitioner is a *pro se* litigant who has attempted to use the courts of the State of Ohio and the federal judiciary to remedy what he perceives as an injustice when The Ohio Industrial Commission denied his workers' compensation claim. Certainly it is a fundamental requirement of due process that a litigant be given an opportunity to be heard upon notice, and Petitioner has been given the opportunity to be heard on numerous occasions. He should not be permitted to use his *pro se* status as a blanket excuse for failing to follow the rules of civil procedure that apply to all parties. The petition for certiorari should be denied.

Respectfully submitted,

Robert B. Crew
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Attorney for Defendant-Appellee
Delco Moraine Division,
General Motors Corporation

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of August, 1986 three copies of the foregoing document were deposited in a United States mailbox, with first class postage pre-paid and served upon Mr. Joe L. Robinson, 5208 Whaley Drive, Dayton, Ohio 45427, Plaintiff *pro se*, and that three copies of the foregoing document were also mailed to Mr. James L. Mayfield, successor to Mr. Robert C. Daugherty, Administrator of the Ohio Bureau of Workers' Compensation, 246 North High Street, Columbus, Ohio 43215.

Robert B. Crew

APPENDIX I

No. 85-3569

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOE L. ROBINSON,
Plaintiff-Appellant
vs.
ROBERT C. DAUGHERTY and
DELCO MORAINE DIVISION,
GENERAL MOTORS CORPORATION,
Defendants-Appellees

BEFORE: JONES and NELSON, Circuit Judges; and
PECK, Senior Circuit Judge

Plaintiff is appealing from a judgment dismissing his civil rights action. The appeal has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the briefs and record, this panel agrees unanimously that oral argument is not necessary. Rule 34(a), Federal Rules of Appellate Procedure.

The record shows that on February 12, 1974 plaintiff sustained an injury while working for the defendant Delco Moraine Division, General Motors Corporation. He filed a claim with the Ohio Bureau of Workers' Compensation which was denied. On March 14, 1978 he filed a complaint in the Common Pleas Court of Montgomery County, Ohio. The Common Pleas Court dismissed plaintiff's case for want of prosecution, and the Ohio Court of Appeals found that the trial court did not abuse its discretion in dismissing the action.

Whereupon, plaintiff filed the present case in federal court against his former employer and Robert C. Daugherty, the former Administrator of the Ohio Bureau of Workers' Compensation. Plaintiff alleged primarily that his former attorney (who was not named or made a party to this action) had failed to prosecute his case in state court because he (plaintiff) was black and the attorney was white. In his "Second Motion to Amend Complaint" and

"Motion to Amend Motion for Jurisdiction," plaintiff also alleged that judges and other officials of the Ohio state courts had discriminated against him in handling his workers' compensation claim.

In an order filed June 25, 1985 the district court dismissed plaintiff's action for lack of subject matter jurisdiction. This timely appeal followed.

It is elementary that "state action" must exist to support a claim under 42 U.S.C. §1983. *Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155 (1978). It is true that a private individual or entity who conspires with state officials to deprive a citizen of his constitutional rights may be held accountable under Section 1983. Martin-Marietta Corp. v. Bendix Corp.,* 690 F.2d 558 (6th Cir. 1982). However, plaintiff has not alleged conspiracy in the instant case, nor has he named as defendants any officials of the state court system who allegedly discriminated against him.

The district court properly concluded that plaintiff failed to state a federal cause of action. He has not presented a claim of racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Plaintiff cannot establish jurisdiction under 28 U.S.C. §1357 ("Injuries under Federal laws") because plaintiff was not enforcing any federal laws when he was injured. Finally, 28 U.S.C. §1445(c) provides that "A civil action in any State court arising under the workmen's compensation laws of said State may not be removed to any district court of the United States."

Regardless of whether plaintiff may have a cause of action against his former attorney or officials of the state courts, the allegations made against the present defendants do not state a claim cognizable in federal court.

Therefore, it is ORDERED that the judgment of the district court be and it hereby is affirmed. Rule 9(d)(2), Rules of the Sixth Circuit. Entered By Order of the Court:

John P. Hehman, Clerk

February 12, 1986

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

JOE L. ROBINSON, Plaintiff	:	
vs.	:	Case No. C-3-84-559
ROBERT C. DAUGHERTY, et al., Defandants	:	

DECISION AND ENTRY SUSTAINING MOTION OF DEFENDANT DELCO-MORAINE TO DISMISS (DOC. #10); COMPLAINT DISMISSED AS TO DEFENDANT DELCO-MORAINE; COMPLAINT DISMISSED, *SUA SPONTE* AS TO DEFENDANT ROBERT C. DAUGHERTY; COMPLAINT DISMISSED WITH PREJUDICE; TERMINATION ENTRY

The Motion of the Defendant, Deico Moraine Division, General Motors Corporation, seeking an Order of the Court dismissing the Amended Complaint of the Plaintiff for the reason that same fails to state a claim upon which relief can be granted (Doc. #10), is deemed by this Court to be well taken and same is, therefore, sustained in its entirety.

Plaintiff's Second Motion to Amend Complaint (Doc. #8) and "Motion To Amend Motion For Jurisdiction" (Doc. #9), both of which were presumably filed in response to this Court's Decision and Entry of March 29, 1985 (Doc. #7) which conditionally sustained the Defendants' Motion to Dismiss the Plaintiff's original Complaint and directed him to file an Amended Complaint within 20 days, both fail to set forth a federal claim upon which relief can be granted. Plaintiff's contention appears to be that Delco should have paid him workers' compensation and that his attorney who handled the case (identity unknown) committed either an act of discrimination or an act of malpractice, or both, in failing to prosecute said claim. Additionally, in his most recent pleading (Doc. #9), the Plaintiff appears to ask this

Court to intervene in a pending collection suit against him in the Dayton Municipal Court. Of course, the abstention principles of *Younger v. Harris*, 401 U.S. 37 (1971), prevent such intervention by this Court.

It is clear to this Court that the Plaintiff has failed, in spite of having been given several opportunities to do so, to set forth an actionable federal claim of discrimination.

Dismissal against the Defendant Delco Moraine Division, General Motors Corporation, is with prejudice. This Court feels that the Plaintiff, having been given several opportunities to file Complaints in which sufficient facts are alleged to support a claim of race discrimination, ought not to be free to harrass the Defendants any further. In this Court's opinion, it has complied with the Sixth Circuit in *Tingler v. Marshall*, 716 F.2d 1109 (6th Cir. 1983).

The Defendant, Robert C. Daugherty, has failed to enter an appearance in this case. However, Robert C. Daugherty, as the former Administrator of the Bureau of Workers' Compensation for the state of Ohio is, nonetheless, entitled to a *sua sponte* ruling by this Court that he should be dismissed as a party defendant to this litigation. There is nothing in any of the pleadings filed by the Plaintiff which would lead to an inference that said Defendant (or anybody working under him) committed any acts which fall within the prohibition of the federal laws against racial discrimination. In this Court's opinion, the *Tingler* decision, *supra*, ought not to require the Plaintiff to perform the vain act of amending a complaint which cannot set forth any federal claim for relief. The dismissal against the Defendant Daugherty is, therefore, with prejudice.

The captioned cause having been dismissed, with prejudice, is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

Walter H. Rice

United States District Judge

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